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No. 76-5415 (A-812)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

ALVIN OLANDA GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 537 F. 2d 118.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1976. On September 8, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including October 15, 1976. The petition was filed on September 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could properly be punished under 18 U.S.C. 659 for both theft of goods and possession of the same goods.

2. Whether theft of goods from separate interstate shipments forms a single offense.

3. Whether the federal prosecution of petitioner was barred because his acts may also constitute violations of state law.

4. Whether federal juries may be drawn from voter registration lists.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of theft from interstate shipments (Counts 1 and 3), and of two counts of possessing goods stolen from interstate shipments (Counts 2 and 4), in violation of 18 U.S.C. 659. He was sentenced to concurrent terms of seven years' imprisonment on Counts 1 and 2, for theft and possession of stolen goods from one interstate shipment, to be followed by concurrent terms of seven years' imprisonment on Counts 3 and 4, for theft and possession of stolen goods from a second interstate shipment. The court of appeals affirmed per curiam (Pet. App. A).

The government's evidence showed that on March 28, 1975, a shipment of sheet steel coils from Ecorse, Michigan, arrived by rail and was unloaded at the terminal facilities operated by General Stevedores, Inc., in Houston, Texas (Tr. 4-6). This shipment was consigned to the White Star Steel Company in Houston

(Tr. 4). Two days later, a shipment of galvanized steel coils from Martin's Ferry, Ohio, arrived by barge at the same facility and was placed in the warehouse on April 1 and 2 (Tr. 6-8). That steel was consigned to Carrier Air Conditioning Company in Tyler, Texas (Tr. 7).

Between midnight and 1:00 A.M. on the morning of April 3, 1975, a trailer truck was observed near the General Stevedore warehouse (Tr. 38). The General Stevedore yard was enclosed by a fence and trucks were not normally allowed to remain in that area overnight (Tr. 25). No truck had been in the yard earlier that evening (Tr. 35-36).

An inventory the following morning revealed that four coils of the sheet steel from Michigan and two coils of the galvanized steel from Ohio were missing (Tr. 8-9). A forklift had apparently been used to remove the steel from the warehouse (Tr. 11, 18, 21).

At approximately 1:00 or 2:00 A.M. on the morning of April 5, 1975, petitioner, an independent truck operator, unloaded the six steel coils at the Astro Value Supply Company yard in Houston (Tr. 65, 76-77, 80). At about 1:00 P.M. that day, petitioner and Robert Denley, an employee, reloaded the steel onto a truck and took it to a warehouse (Tr. 87-91). It was there reloaded onto two trucks belonging to the Allstate Trucking Co. (Tr. 108-109, 116, 127), and taken to the Allstate Trucking Co. depot, where the trucks were parked with the steel still aboard.

The steel coils were identified by the consignees on April 8, 1975 (Tr. 116-117, 127, 135, 149).

Petitioner was interviewed by William Russ, a special agent of the Federal Bureau of Investigation, on April 19, 1975. After being advised of his rights, petitioner denied any knowledge of the theft and denied moving the steel on April 5, 1975 (Tr. 149-152). Russ again interviewed petitioner on April 22, 1975. After being again informed of his rights, petitioner altered his story. He stated this time that on April 1, 1975, he had been approached by a person named George who asked to borrow petitioner's truck. According to petitioner, George explained that his truck had broken down and that he needed to move and store some coils. Petitioner stated that he moved the coils to Astro Value, for which he was to receive $300 from George. Petitioner did not receive the $300 and he subsequently concluded that the goods must have been stolen since they had not been removed from Astro Value. Petitioner then decided to sell the steel. On April 5, 1975, petitioner told Russ, he moved the coils to a warehouse where they were to be sold (Tr. 152-165).

ARGUMENT

1. We agree that petitioner was improperly convicted under 18 U.S.C. 659 for both theft and possession of the same goods. As we noted in Solimine v. United States, No. 76-72, vacated and remanded December 6, 1976, we believe that the rationale of this Court in United States v. Gaddis, 424 U.S. 544, barring multiple convictions under 18 U.S.C. 2113 for bank robbery

and possession of the proceeds of that robbery, applies also to multiple convictions under 18 U.S.C. 659 for theft from an interstate shipment and possession of the proceeds of that theft.

In Gaddis, this Court held that where the evidence showed that defendants were the robbers, and that any possession of the proceeds derived from that fact, no new trial was required, since the conviction on the possession count could simply be vacated on appeal. For the reasons noted in our brief in opposition to the petition for certiorari in Sellers v. United States, No. 76-5485, certiorari denied, January 25, 1976, the same result now follows where the jury has returned a verdict of guilty on both the robbery and possession counts. 1/ Accordingly, we do not oppose a grant of the petition for the limited purpose of remanding the case to the district court to vacate the convictions imposed for possessing goods stolen in interstate commerce.

2. The remainder of petitioner's contentions are without merit. 2/

1/ We are sending petitioner a copy of our brief in Sellers.

2/ In addition to the claims discussed in the text, petitioner contends, in an "exhibit" received in this office on September 22, 1976, that he was not properly apprised of his rights under Miranda v. Arizona, 389 U.S. 436, since he did not sign a written waiver. This claim is entirely without basis. Petitioner was not in custody when he made the statements summarized above at page 4. Further, this Court has never suggested that Miranda requires a written waiver.

Petitioner also apparently contends in the "exhibit" that the evidence was insufficient to sustain his conviction. There is no reason for this Court to review the essentially factual determination in the trial court, which was affirmed by the court of appeals, that the evidence warranted petitioner's conviction.

a. Petitioner was charged under 18 U.S.C. 659 with theft of goods from two separate interstate shipments. Petitioner urges that he cannot be convicted and sentenced on separate counts under 18 U.S.C. 659 because the goods at issue were taken at a single time, and from a single place. The question is one of statutory construction; if Congress so intends, one transaction may constitute multiple offenses. Ebeling v. Morgan, 237 U.S. 625 (cutting of several mail bags taken from same car constitutes multiple offenses), Barringer v. United States, 399 F. 2d 557 (C.A. D.C.), certiorari denied, 393 U.S. 1057 (robbery of two persons at same time constitutes two offenses).

Section 659 proscribes the stealing of goods "moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property." While Congress could have made each transaction involving taking of goods in interstate commerce a single offense, the language of the statute indicates that Congress did not do so. Rather, it gave maximum protection to each individual interstate shipment by making each unauthorized taking of goods which "constitute" an interstate shipment, or part thereof, a separately punishable offense. See Oddo v. United States, 171 F. 2d 854, 856-858, (C.A. 2), certiorari denied, 337 U.S. 943 (theft of different interstate shipments in a single truck constitutes separate violations of 18 U.S.C. 409 [now 18 U.S.C. 659]), United States

v. DeNormand, 149 F. 2d 622, 624-625, (C.A. 2), certiorari denied, 326 U.S. 756 (theft at single time of two trucks containing interstate shipments constitutes two separate offenses under 18 U.S.C. 409).

Petitioner, accordingly, was properly convicted and sentenced for two thefts from two interstate shipments.

b. Petitioner claims that his prosecution under federal law is barred because the acts of which he was convicted also violated state law (Pet. 7a-7b). 3/ This claim was not raised in the court of appeals and therefore should not be considered now. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2, and cases cited therein. In any event, it is without merit. There has been no state prosecution in this case, and even if there had been, the federal government would not be precluded from prosecuting petitioner under federal law. Abbate v. United States, 359 U.S. 187.

Petitioner seeks also to invoke the policy of the Department of Justice against prosecuting individuals already convicted by the courts of a state for crimes involving the same acts on which the state convictions is based. See Hayles v. United States, 419 U.S. 892, Ackerson v. United States, 419 U.S. 1099.

3/ Petitioner also claims (Pet. 8-10) that the trial court erred in instructing the jury concerning scienter necessary for conviction of possession of stolen goods. At petitioner's request, the trial transcript did not include the judge's instructions to the jury (Tr. 183). Petitioner should not now be heard to complain of those instructions, since, as a result of his action, they are no longer available for review. If the conviction for possession of stolen goods are vacated, this issue is moot in any event.

The policy that petitioner cites would not apply in this case since there has been no state prosecution. Further, that policy does not create any right in defendant not to be prosecuted; rather, it is a housekeeping policy which sets out a general rule to which exceptions can be made in appropriate cases by the Department. See, United States v. Hutul, 416 F. 2d 607, 626 (C.A. 7), certiorari denied, 396 U.S. 1012.

c. Petitioner contends for the first time in this Court (Pet. 10-12) that the grand and trial juries in his case were illegally selected because they were drawn from the list of registered voters. The claim is therefore not properly before this Court. Adickes v. S.H. Kress & Co., supra. Moreover, any challenge to the composition of the grand or petit jury was waived when it was not brought by pretrial motion pursuant to Rule 12(b)(2), Fed.R.Crim.P.; facts concerning jury selection were well known and available to petitioner in the exercise of due diligence before trial. Shotwell Mfg. Co. v. United States, 371 U.S. 341. In any event, petitioner's claim is without merit. The Jury Selection and Service Act of 1968 allows the use of voter registration lists in selecting jurors for federal courts, and provides that use of additional sources will be the exception rather than the rule, 28 U.S.C. 1863(b)(2). The use of voter registration lists has been repeatedly approved. See, e.g., United States v. King, 492 F. 2d 895 (C.A. 8); United States v. Dellinger, 472 F. 2d 340, 364-366 (C.A. 7), certiorari denied, 410 U.S. 970; United States v. Ross, 468 F. 2d 1213, 1216 (C.A. 9),

certiorari denied, 410 U.S. 989; Simmons v. United States, 406 F. 2d 456, 462-463 (C.A. 5), certiorari denied, 395 U.S. 982. Petitioner suggests no basis for a different result here. He does not claim that the voter registration lists used in selecting the juries reflected discriminatory practices, or that use of the lists resulted in systematic exclusion of any identifiable group within the community.

CONCLUSION

The petition for a writ of certiorari should be granted for the limited purpose of remanding the case to the district court for consideration in light of this Court's disposition of Solimine v. United States, supra. In all other respects, the petition should be denied.

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